

MARITIME CRIME AND THE EXTRA TERRITORIAL JURISDICTION OF THE QUEENSLAND COURTS

By

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1. Introduction

During 1984 and 1985 three Justices of the Supreme Court of Queensland each held that the court had jurisdiction to hear offences against the Queensland Criminal Code committed around islands and over reefs in the Torres Straits (The trials of Fritz).¹

These rulings raise important questions about the relationship between s.14A of the Code, s.5 of the *Coastal Waters (State Powers) Act* 1980 (Cth), the *Crimes at Sea Act* 1979 (Cth) and the Imperial Admiralty Jurisdiction.

2. The Judicial Rulings

In the first trial of Fritz the Crown attempted to join four separate counts in the indictment. The accused demurred to the jurisdiction of the court pursuant to s.605 of the Criminal Code. The first count in the indictment alleged a rape "in Queensland". This related to an incident on a motor vessel moored to a rock fill jetty at an island called Mabuiag Island which lies about 90 kilometres north of the tip of Cape York. This island is part of Queensland.² At low tide the keel rested on the bottom of the sea although water probably remained around the vessel. In relation to this count the learned trial judge Ambrose A.J. (as he then was) ruled that the motor vessel was within the State of Queensland. He did not address the question of where the territory of Queensland ended and it is not able to be discerned from the record whether argument or authorities on this question were directed to him. However, it would seem clear since the decision of the High Court in *N.S.W. v. Commonwealth*³ that the boundaries of Queensland end at the low water mark, (there being no question in this case of historic bays or other exceptions under s.14 of the *Seas and Submerged Lands Act*)⁴ and that in this respect the learned Judge was in error.

In addition, the jetty at Mabuiag Island is inside the territorial sea baselines and is therefore part of the internal waters of Australia and sovereignty is vested in the Commonwealth by s.10 of the *Seas and Submerged Lands Act*. His honour took the view that if he was wrong in his ruling outlined above then, nevertheless, the criminal laws of Queensland applied because of the application of the ratio in *Barnes v. Cameron*⁵ to the fact that Fritz's vessel was so close to a part of Queensland.

Barnes v. Cameron looked at a specific regulation under the Green Island Jetty Regulations which required a permit to be obtained by any person "on the jetty or any vessel berthed

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1. *R v. Dennis Melvin Fritz (No. 1)* Supreme Court Cairns 19th November — 22nd November 1984 (Ambrose A.J. Unreported); *R v. Fritz (No. 2)* Supreme Court Cairns 14th February — 19th February 1985 (Thomas J. Unreported); *R v. Fritz (No. 3)* Supreme Court Cairns 27th March — 28th March 1985 (Kelly J. Unreported).
2. As annexed by the Queensland Coast Islands Act of 1878 and Letters Patent of 1878. See also *Wacando v. Commonwealth of Australia and the State of Queensland* (1981) 148 CLR 1.
3. (1975) 135 CLR 337.
4. Act No. 161 of 1973 (Cth). See also an article by D.P. O'Connell *Bays, Historic Waters and the Implications of A. Raptis & Son v. South Australia* 52 ALJ 64.
5. (1975) Qd R 128.

at the jetty” who amplified words or music. Lucas J., with whom the other members of the court agreed, assumed for the purpose of the decision that the territory of Queensland stopped at the low water mark (the decision antedated *N.S.W. v. Commonwealth*). Lucas J. held that nevertheless the Queensland Parliament possessed the power to make laws having operation beyond the low water mark, provided that these laws may fairly be said to be laws for the peace, welfare and good government of Queensland. Hence that regulation was held to have had a sufficient connection with Queensland to be a valid enactment within that test.⁶

That case is simply authority for the proposition that the Queensland Parliament does have a power to legislate extra-territorially where the enactment is for the peace, welfare and good government of Queensland and sufficient nexus is established. That proposition is founded on the highest authority.⁷

It is difficult, with respect, to see how that case, which involved just such an enactment, could be generally called in aid of the proposition that just because an offence is committed “so close” to a part of Queensland the criminal laws of Queensland apply. The only relevant provision of the Criminal Code which purports to legislate extra-territorially is s.14A. However, His Honour, for other reasons that will be dealt with below, did not hold that s.14A did so apply within three miles of the low water mark.⁸

It follows that the authority of *Barnes v. Cameron* does not validate the application of the Queensland criminal laws to offences committed “near” to Queensland except to the extent that s.14A of the Criminal Code can be held to be a valid enactment of the plenary powers of the Queensland Parliament to legislate extra-territorially.

Ambrose A.J. did find that the offence occurred within three nautical miles of the low water mark. He held that s.5 of the *Coastal Waters (State Powers) Act 1980 (Cth)*⁹ was of ambulatory effect and therefore applied it to extend the Criminal Code to acts done within three miles of the low water mark of Mabuiag Island.

Section 5 is as follows:-

Legislative powers of States.

5. The legislative powers *exercisable from time to time under the constitution of each State* extend to the making of -

(a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time, were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the State.

The definition section defines “Coastal Waters of the States” as being the parts of the territorial sea that are within the “adjacent area” of the State although by Section 4(2) the territorial sea breadth is always limited to three nautical miles. The sea to the *landward* side of the territorial sea is also included in the definition of Coastal Waters. The territorial sea baselines from which the three mile breadth is measured are declared by Proclamation No. 529 dated 9th February, 1983 published in the Australian Government Gazette¹⁰ and are shown on official maps. It should be noted that the effect of the baselines is to extend the territorial sea in the cases of many islands considerably beyond three miles from the mean low water mark.

6. *Ibid.* at 136.

7. See *Croft v. Dunphy* (1933) AC 156; *Pearce v. Florenca* (1976) 135 CLR 507.

8. Transcript *Fritz (No.1)* at 62.

9. Act No. 75 of 1980 (Cth) effective from 14th February, 1983.

10. Special Gazette of the Commonwealth of Australia, 13752/82 Cat. No. 825805-4.

The “adjacent areas” of the States are defined in Schedule 2 of the *Petroleum (Submerged Lands) Act* 1968 (Cth) (as amended by Schedule 2 of the 1973 Act)¹¹ and encompass an area that in most places is well beyond 200 kilometres from the low water mark of the coast.

The second count in the indictment alleged a rape “on the high seas within 200 miles of Queensland”. This related to an incident in a dinghy over the Markai Reef which is situated between Mabuiag and Turnagain Islands and about 15 nautical miles from each. Turnagain Island is also a part of Queensland.

Ambrose A.J. held that the offence over this reef was committed upon the “high seas” within the meaning of s.14A of the Criminal Code.¹²

Argument had been advanced by the defence that because of the nature of that area of waters (including strong currents and tides up to three metres twice a day), vessels of sufficient size to come within the meaning of “great ships” at common law could not go there and that on the authorities it followed that it was not on the “high seas”.¹³

The evidence was to the effect that it was possible to cross Markai Reef with larger vessels of a shallow draught at high tides of about 6 to 8 feet but that at low tides there would only be a few feet of water covering parts of the reef when rocks and coral heads would be exposed.¹⁴

The argument was founded on the following authorities: *R v. Anderson* (1868) Law Rep 1 CC 161; *The Mecca* 1894 P.95; *The Tolten* (1946) 2 All ER 372; *Union Steamship Co. of New Zealand v. Ferguson* (1967-69) 119 CLR 191 at 207 and *Regina v. Liverpool Justices Ex parte Molyneaux* (1972) 2 QB 394. These authorities support the general proposition that the “high seas” include all oceans, seas, bays, channels, rivers, creeks and waters below low water mark, and where the “great ships” could go.

While it is true that the term “high seas” in the cases cited relate to the construction of different statutes to that of the Queensland Criminal Code they are obviously of highly persuasive effect, particularly as criminal statutes were under consideration in the cases of *R v. Anderson* and the *Liverpool Justices Case*.

Ambrose A.J. observed that he had always been of the impression that the high seas were the seas outside the territorial limits of a State and that it did not matter how deep they were and that they did not cease to be the high seas because “big ships” could not go on it without foundering.¹⁵

It is submitted, with respect, that the latter proposition accords with common sense. His Honour held that “high seas” in s.14A of the Code did *not* include the territorial seas of Queensland because of the operation of the *Constitutional Powers (Coastal Waters) Act* 1980 (Qld). He held that the Markai Reefs were part of the high seas because:

- (a) They were more than three nautical miles from any part of Queensland (including the closest island which is part of Queensland and the Torres Strait).
- (b) They were not within three nautical miles of any land mass in or bordering the Torres Strait.
- (c) Upon the evidence the reefs in the vicinity of the site of the alleged offence may be crossed by quite large boats (in excess of 100 feet in length) for periods up to three hours duration at about the time of high tide.¹⁶

11. Act No. 36 of 1973 (Commonwealth).

12. *Supra* n.8 at 64.

13. *Ibid.* at 60.

14. *Ibid.* at 48.

15. *Ibid.* at 59.

16. *Ibid.* at 65.

It is unclear what the significance of (b) is unless it is a reference to the territorial seas of another State, and here logically Papua New Guinea. However, the territorial seas of Papua New Guinea are in some places less than three nautical miles wide.¹⁷

It is implied in (c) that His Honour was applying at least so much of the definition of "high seas" in the authorities referred to that relates to "where the great ships can go".

This ruling raises the question whether or not s.14A of the Queensland Criminal Code is a valid enactment of the Queensland Parliament. If it is then His Honour's ruling [assuming the validity of the *Coastal Waters (State Powers) Act 1980 (Cth)*] may well be correct. No argument was advanced in respect of the effect of either s.2 of the Colonial Laws Validity Act or the Imperial Admiralty Legislation on s.14A of the Code.

In relation to this same allegation Mr Justice Thomas accepted in the second trial of Fritz that the court had jurisdiction and the indictment was framed by particularizing the position of the Markai Reef without alleging that it was either "in Queensland" or on "the high seas".

The third count in the indictment before Ambrose A.J. alleged incest on the "high seas within 200 miles of Queensland". This related to an incident in a dinghy over a reef in the Prince of Wales Channel adjacent to Hammond Island. Hammond Island is also part of Queensland.

Ambrose A.J. held that the situation of this allegation was *probably* within three nautical miles of Queensland (i.e. of Hammond Island).

The Prince of Wales Channel carries very large ships under pilot. His Honour held that if it was within three nautical miles of Queensland then by virtue of s.5 of the *Coastal Waters (State Powers) Act* the State criminal laws applied but that nevertheless it was not upon the high seas under s.14A of the Code. His Honour went on to hold that if it was outside the three mile limit then it was upon the high seas pursuant to s.14A of the Code.

At the time of the commission of this offence, i.e. between March and May 1981, the territorial seas baselines had been declared by Proclamation dated 24th October 1974 which probably identified the low water mark of the tip of Cape York Peninsula as the baseline. However, at the date of the trial the baselines set by the Proclamation of February 1983 applied so that the reefs in question were within the internal waters of Australia being within the territorial seas baseline.¹⁸

This same allegation was tried before Mr Justice Kelly (as he then was) in the third trial of Fritz. His Honour, unlike Ambrose A.J., found the location was clearly within three nautical miles of either Hammond Island or Goods Island, both of which are part of Queensland. From that fact his Honour held that:

There are two bases on which on these facts the legislative power of the Parliament of Queensland extended to making a law such as the Criminal Code which had operations at the place in question.¹⁹

His Honour was not, of course, referring to the application of the Code by virtue of s.14A because the place was not "on the high seas". Rather he was referring to the application of the Code generally.

The first basis His Honour referred to was the power of Parliament to make law such as the Criminal Code "which can fairly be said to be a law for the peace, welfare and good

17. See Treaty between Australia and Papua New Guinea (Torres Strait Treaty) Article 3 in the Schedule to the *Torres Strait Fisheries Act* (Qld) No. 101 of 1984.

18. *Supra* n.10.

19. *R v. Fritz (No.2)* Transcript at 47.

government of Queensland, which had operation beyond the low water mark".²⁰

He cited *Barnes v. Cameron* and *Pearce v. Florenca*²¹ as the authorities for that proposition.

His Honour's second basis was that of s.5 of the *Coastal Waters (State Powers) Act*. He observed:

By the operation of this legislation I am satisfied that the place in question was within the coastal waters of Queensland. I would consider that s.5 of the Commonwealth Act dealing with the Legislative powers exercisable from time to time under the Constitution of each State *should be so read as to apply to legislation already in force, as well as to legislation to be enacted in the future.* (Emphasis added).

Regarding his honour's first basis, if one accepts that a State has power to legislate extra-territorially (and that power for present purposes is not doubted), it is submitted with respect that there must be some piece of legislation purporting to do so before that legislation can be applied. In *Pearce v. Florenca*, for example, it was the Western Australian Fisheries Act applying to fishing in waters within three nautical miles of the coast of Western Australia. In *Barnes v. Cameron*, it was the Green Island Jetty Regulations purporting to apply to vessels berthed at the jetty.²²

The Queensland Criminal Code, as earlier observed, does not purport to have extra-territorial effect except primarily by virtue of s.14A and His Honour has not purported to hold that the Criminal Code applies in the area in question by virtue of the operation of s.14A. The Code does not otherwise apply outside of Queensland which ends at the low water mark (*N.S.W. v. Commonwealth*).²³ There is no general Queensland legislation applying state laws in Offshore Waters such as is enacted for example in South Australia (see *A. Raptis & Son v. S.A.*).²⁴ Therefore, the first basis relied on by the learned Judge does not seem to be directly supported by the authorities although they are not directly against it.

Regarding the second basis the learned judge interpreted the words "exercisable from time to time" as applying to legislation already in force (and presumably therefore all Queensland legislation already in force whether the legislation is expressed to have operation in the territorial sea or not).

Ambrose A.J. also construed this Section as "having an ambulatory effect and as not being limited in effect to legislation of a State passed subsequent to its enactment which is expressed to apply to within the three mile territorial sea area of Australia."²⁵

Yet, neither Kelly J. nor Ambrose A.J. sought to apply it because of any existing extra-territorial effect of the Criminal Code.

This construction of the Coastal Waters Act would appear, with respect, to be somewhat too far-reaching. The Act is expressed to be "an Act to extend the legislative powers of the States in and in relation to Coastal Waters".

Section 5 speaks of *extending* the powers *exercisable* from time to time. It does not purport to apply all or indeed any laws to the coastal waters. This is in contrast, for example, to the *Crimes at Sea Act 1979* (Cth) which uses the language "the Criminal Laws in force in a State apply to and in relation to ..." or to s.68 of the *Judiciary Act 1903* (Cth) which

20. *Ibid.* at 46.

21. *Supra* n.7.

22. See also *Croft v. Dunphy* 1933 AC 156 — Canadian anti-smuggling legislation; *O'Sullivan v. Dejnko* (1964) 110 CLR 498 — the extra territorial operation of the NSW Road Maintenance Act applying to inter state persons; *Robinson v. Western Australia Museum* (1977) 138 CLR 283 — the operation in off shore waters of the Western Australian Act dealing with wrecks.

23. *Supra.* n.3.

24. (1977) 138 CLR 346 at 355.

25. *R v. Fritz (No.1)* *supra* n.8 at 62-63.

speaks of "The laws of each State ... shall ... apply and be applied so far as they are applicable to persons charged with offences against the Laws of the Commonwealth". Section 5 is considered further in 4 below.

The fourth count in the indictment related to an incident in an inlet to Turnagain island. Ambrose A.J. applied much the same reasoning as he had to the first count and Kelly J. relied on his "first basis" above. Ambrose A.J. consequently ordered that the second, third and fourth counts be severed from the indictment. Fritz was acquitted of the remaining count. The second count was tried before Mr Justice Thomas and the accused was convicted. He was also convicted of the third and fourth counts during the third trial before Mr Justice Kelly.

3. Section 14A of the Criminal Code and the Admiralty Jurisdiction

(a) The Imperial Legislation

From 1389 the jurisdiction of the Admiral began to be cutdown and transferred to Special Commissions.²⁶ *The Offences at Sea Acts* of 1536²⁷ and 1799²⁸ gave the Commissioner the jurisdiction to hear and determine "every offence" committed in or upon the sea, or in any haven, river, creek or place where the Admiral had jurisdiction. This was of course the "high seas".

In 1806 Special Commissioners were appointed for the colonies and given the same jurisdiction as the English Commissioners.²⁹

The effect of this statute was to make all offences committed at sea triable in the colonies or dominions in accordance with the 1536 Act which meant the application of English Laws and penalties.³⁰

The *Australian Courts Act* of 1828³¹ gave the Supreme Court of N.S.W. and "Van Diemen's Land" the same admiralty jurisdiction as the Admiral had had with respect to offences on the "high seas" by the "master or crew of any British ship or vessel, ... or by any British subjects sailing in or belonging to" or who had quitted "any British ship or vessel." These offences were to be tried and punished according to English law. Section 24 of the act applied all Imperial Laws "in the administration of Justice" that were in force which included the 1799 *Offences at Sea Act* and therefore the 1536 Act because that latter act was continued to apply by express words in clause 34 of the 1799 Act.

In 1849 the *Admiralty Offences (Colonial) Act*³² provided for the trial of Admiralty Offences in the Colonies by giving jurisdiction to the local courts and imposing the same penalty as applied in England. Section 4 however provided that nothing in the Act was to affect or abridge the jurisdiction of the Supreme Courts of N.S.W. arising from the 1828 Australian Courts Act.

In 1874 the *Courts (Colonial) Jurisdiction Act* provided that persons convicted under Admiralty Legislation were to be liable to the same punishment "or that punishment as most nearly corresponds" as might be inflicted if the crime or offence had been committed within the limits of the colony.

26. 13 Richard II, Ch 5. See generally C.A. Ying "Colonial and Federal Admiralty Jurisdiction" 1981 Federal Law Review at 236 and C. Saunders "Maritime Crime" Melbourne University Law Review, Vol. 12, December 1979, at 158.

27. 28 Henry 8, cl. 15.

28. 39 George 3, cl. 54.

29. *Offences at Sea Act* 46 George 3, cl.54.

30. 28 Henry 8 cl.15 "judged ... in like form and condition, as if any such offence or offences had been committed or done in or upon the land."

31. 9 George 4, Cl. 38 Section 4.

32. 12 and 13, Vic. cl.96.

The 1878 *Territorial Waters Jurisdiction Act*³³ extended the Admiralty jurisdiction to offences by British subjects and foreigners within one marine league of the low water mark although committed on board or by means of a foreign ship.

In *R v. Bull*³⁴ Barwick C.J.,³⁵ Mason³⁶ and Stephens³⁷ JJ., applying the Privy Council decision of *R v. Mount*³⁸, held that the 1849 *Admiralty Offences (Colonial) Act* gave jurisdiction to the Colonial courts to try offences according to English Law not colonial law and further that the 1874 Act merely allowed the imposition of the appropriate colonial punishment.

Gibbs J³⁹ (as he then was) and Menzies J⁴⁰ held that the 1849 Act should be read literally in view of the passing of the 1874 Act and that therefore the colonial courts had jurisdiction to hear offences committed on the high seas, whether they were offences against English or colonial laws. Menzies J did observe however that the 1878 Act confined the jurisdiction of the colonial courts to offences against the law of England when committed within the territorial sea⁴¹ (i.e. within one marine league of the low water mark.)

The remaining member of the court, McTiernan J, did not address these issues.

In *Oteri v. R*⁴² the Privy Council held that English law (the Theft Act) applied to offences of stealing by Australian citizens on an Australian fishing boat of cray pots owned by other Australian citizens 22 miles from the coast of Western Australia. The court held that the 1799 Act was ambulatory in effect applying new offences created by English statutes to offences within the jurisdiction of the Admiral in accordance with the 1536 Act.⁴³ It was further held that the *Admiralty Offences (Colonial) Act* of 1849 gave jurisdiction to the Western Australian Court to exercise Admiralty jurisdiction by applying English laws and that the 1874 Act merely supplemented the 1849 Act by providing that in the case of a *conviction* for an offence on the high seas the punishment shall be the same as if the offence had been committed within the limits of the State.⁴⁴

The decision in *Oteri* turns fundamentally upon the proposition that the criminal law of England is extended by Admiralty jurisdiction to all offences on the high seas by British subjects or, on or from British ships. A ship is a British ship if it is owned by a British subject.⁴⁵ At the time of *Oteri's* case (and at the time of the enactment of s.14A of the Queensland Criminal Code in 1976) Australian (and therefore Queensland) citizens were British subjects by operation of the *British Nationality Act* 1948 (United Kingdom). This would continue to be the case after the passing of the *British Nationality Act* 1981 (United Kingdom) because of the effect of s.51(1)(b) of that Act.⁴⁶

33. 41 and 42 Vic. cl.73 Section 2, 7.

34. (1974) 131 CLR 203

35. *Ibid.* at 226-228.

36. *Ibid.* at 279.

37. *Ibid.* at 269.

38. (1875) LR 6 PC 283.

39. *Supra* n.34 at 262.

40. *Ibid.* at 247.

41. *Ibid.* at 279.

42. (1976) 1 WLR 1273.

43. *Ibid.* at 1276.

44. *Ibid.* at 1276. See also *William Holyman & Sons Pty. Ltd. v. Eyles* 1947 Tas SR 11.

45. *Merchant Shipping Act* 1894 (Imperial) s.1.

46. '51(1) ... in any enactment whatever passed ... before commencement "British subjects" and "Commonwealth Citizen" have the same meaning that is:

(b) in relation to any time after commencement, a person who has the status of a Commonwealth citizen under this Act.'

(b) The Queensland Admiralty Jurisdiction

The Supreme Court of Moreton Bay was established in 1856 by the *New South Wales Act*⁴⁷ and granted the powers and jurisdiction of the Supreme Court of N.S.W. That act was repealed in 1861 by the *Supreme Court Constitution Amendment Act*⁴⁸ which may have repealed the *Australian Courts Act* 1828 so far as it contributed to the Queensland Courts jurisdiction.⁴⁹ In 1867 the *Supreme Court Act (Qld)*⁵⁰ by Sections 34 and 35 gave the Court the power and jurisdiction of the N.S.W. Supreme Court as the same existed at 1859. Section 20 applied all laws and statutes in force within the realm of England at the time of the passing of the 1828 *Australian Courts Act* "not being inconsistent with" any law in force in Queensland in 1867. In 1859 the N.S.W. Supreme Court continued to have the Admiralty Jurisdiction conferred by the *Australian Courts Act* 1828 and hence a similar jurisdiction may have been conferred on the Queensland Court by sections 34 and 35 of the 1867 Act. However the *Imperial Admiralty Offences (Colonial) Act* of 1849 would have applied to the Colony of Queensland after separation from N.S.W. in 1859 and if that Act is "inconsistent with" the 1828 *Australian Courts Act* then the Imperial Act would continue to apply in Queensland. Since the 1867 *Supreme Court Act* is an act of the Queensland Parliament it could not override the paramount Imperial Act of 1848.

There would seem, therefore, to be two possibilities, either:-

- (i) The 1828 *Australian Courts Act* Admiralty jurisdiction of the N.S.W. Supreme Court has been validly conferred on the Queensland Supreme Court. In that event, it seems tolerably clear that English law is applied.⁵¹

or

- (ii) The *Admiralty Offences (Colonial) Act* 1849 (Imp) applies to Queensland. In that event the 1874 and 1878 Acts would also apply. If the views of Barwick C.J., Mason and Stephen JJ. in *R v. Bull*⁵² and of the Privy Council in *Oteri*⁵³ are correct the Admiral's jurisdiction would also involve the application of English criminal laws.

(c) Repugnancy

Section 2 of the 1859 *Colonial Laws Validity Act*⁵⁴ states that any colonial law which is or shall be in any respect repugnant to the provisions of any Imperial Legislation extending to a colony, shall be read subject to such Act and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

The *Statute of Westminster* 1931 (Imp.) removed the effect of s.2 of the C.L.V.A. prospectively from any law passed by the Federal Parliament, however, the provision continued to apply to State Legislatures until the passing by the United Kingdom Parliament of the requested Act in the Schedule to the *Australia (Request and Consent) Act* 1985 (Cth). The provision in the *Australia Act* repealing the fetter of the C.L.V.A. is expressed to be prospective.⁵⁵

47. 20 Vic No.25.

48. 25 Vic No.13.

49. *R v. Barton* (1879) 1 QLJ Supp 16 at 19.

50. 31 Vic No.23.

51. 9 George 4 Cl. 38, Section 4, "... in case the same had been committed and were respectively inquired of, tried, heard, determined and adjudged, in England; any law, statute or usage to the contrary notwithstanding".

52. *Supra* n.34.

53. *Supra* n.42.

54. 28 and 29 Vic Cl. 63.

55. SI 1986/319 assented to 17th February 1986 and came into force on the 3rd March, 1986. See Section 3 of the Act in the schedule to the *Australia (Request and Consent) Act* 1985 (Cth). See generally M. Moshinsky "State Extraterritorial Legislation and the Australia Act 1986" (1987) 61 ALJ 779.

In *Union Steamship Co. of New Zealand v. The Commonwealth*⁵⁶ Higgins J. held that a colonial act is repugnant to Imperial legislation if it involves “either directly or indirectly, a contradictory proposition — probably, contradictory duties or contradictory rights.”⁵⁷ Isaacs J. quoted with approval from *Hearns Government of England* 1886 2nd Edn at p.596 and accordingly repugnancy was defined to imply, not diversity, but conflict; that is, if there were an Imperial law and a colonial law on the same subject, but with different enactments, the Imperial law must prevail.⁵⁸

His Honour observed that the test was that of “inconsistency or contrariety”⁵⁹.

The Queensland Parliament has purported to apply State criminal laws to various persons within 200 miles of Queensland. Section 14A is as follows:

Offences committed on the High Seas.

- (1) Any person connected with Queensland who, while in on under or over the high seas within two hundred miles of Queensland, does any act or makes any omission of such a nature that if he had done the act or made the omission in Queensland he would have been guilty of an offence against the Statute Law of Queensland is guilty of an offence and shall be liable to arrest, prosecution and punishment in all respects as if such act or omission had occurred in Queensland and the courts of Queensland shall have jurisdiction accordingly.
- (2) For the purposes of this section, a person connected with Queensland includes a person who-
 - (a) is or is normally resident or is domiciled in Queensland; or
 - (b) is on or operating from a vessel, aircraft, rig or other structure or installation of any kind licensed or required to be licensed or operation or functioning pursuant to the authority of, or as regulated by, a law of Queensland.
- (3) Any person who, while in on under or over the high seas within two hundred miles of Queensland, does any act or makes any omission affecting the person or property of a person connected with Queensland of such a nature that if he had done the act or made the omission in Queensland he would have been guilty of an offence against the Statute Law of Queensland and afterwards comes into Queensland, is by such coming into Queensland, guilty of an offence of the same kind and is liable to the same punishment as if he had done the act or made the omission in Queensland.

“Vessel” is defined in s.1 of the Criminal Code to include a ship, boat and every other kind of vessel used in navigation.

Hence, the Section purports to apply to a very wide range of persons on the high seas including non-residents who are on, inter alia, ships subject to various forms of Queensland regulation.

Since the jurisdiction of the Admiral applies to offences by British subjects

- (i) anywhere on the high seas and
- (ii) to offences *by anyone* on a British ship on the high seas and
- (iii) (after the 1878 Act) to *offences by anybody on any ship* within one marine league of the coast

it is apparent that s.14A(1) of the Queensland Code purports to cover categories (i) and (ii) at least.

Subsection 3 of s.14A purports to apply to persons in category (iii) although it is different

56. (1925) 36 CLR 130.

57. *Ibid.* at 159 see also *McCawley v. R* (1918) 26 CLR 9.

58. *Ibid.* at 148.

59. *Ibid.*

in three respects. Firstly, the offence by the foreigner under the Code provision must be in respect of the person or property of a person connected with Queensland (i.e. against the equivalent of a British subject or a person on a British Ship). Secondly, the foreigner must come into Queensland whereas under the 1878 Act he may be arrested and prosecuted simply with the leave of the Governor of the relevant colony. Thirdly, the Queensland provision purports to extend in respect of the foreigner right to the 200 mile limit.

If the various English criminal laws are applied it can be argued that there is direct conflict between those laws and the Queensland criminal laws applied by s.14A of the Code. For example, if a charge of rape is prosecuted under English Law the relevant Sexual Offences Act⁶⁰ applying involves different tests for culpability than does the Queensland Criminal Code and, in particular, the complainant woman *may be the spouse of the accused*. In addition, the test of mistaken belief in consent is that of "honesty" under the English Act⁶¹ whereas in Queensland the belief must also be reasonably held.⁶²

Murder in Queensland possibly imports more stringent tests for determining whether intent exists than does the English law. Whereas, the Crown in Queensland must prove the existence of an actual intention to cause death or grievous bodily harm, under English law gross negligence (where the assailant recognises the high probability of death or grievous bodily harm but does not positively desire it) may suffice.⁶³ The English *Theft Act* provisions are also quite different to the Queensland Code provision and different punishments are often provided for in the English Criminal Statutes compared to those applying under the Queensland Criminal Code.

Thus, when applying the test in the *Union Steamship Case*,⁶⁴ the respective criminal statutes involve contradictory duties and contradictory rights. There may be, therefore, direct collision between them.

Section 14A may be an otherwise valid enactment of the Queensland Parliament because there is sufficient connection or nexus with Queensland.⁶⁵ It is clear that the scheme of the section is to apply the criminal laws of the State to persons outside the territorial limits of the state whose "nexus" or "connection" with Queensland is through residence or domicile or presence in Queensland. These classes of people clearly are not too remotely connected with the state. Section 14A also applies to persons who are on "vessels" etc. which are licensed, or operating pursuant to the law of Queensland. Again there may be sufficient connection with Queensland although it may be doubtful that sufficient "nexus" exists with Queensland in the case of a crime that has no particular reference to a vessel of the type mentioned in subsection 2(b) of s.14A and is only therefore subject to Queensland law because it happens to be committed by a person on such a vessel within 200 miles of Queensland.⁶⁶

The argument remains that s.14A, whilst otherwise a valid extra-territorial enactment of the Queensland Parliament, may still be void for repugnancy to Imperial Admiralty

60. *Sexual Offences (Amendment) Act 1976* (U.K.).

61. See *D.P.P. v. Morgan* (1975) 2 W.L.R. 913.

62. Section 24 Criminal Code (Queensland).

63. Compare *Willmott v. R* (1985) Qd R 413 with *Hyam v. R* (1975) AC 55 and *La Fontaine* (1976) 136 CLR 62. However *Moloney v. R* (1985) 2 W.L.R. 648 suggests that the recognition of the probability of death or grievous bodily harm is part of the law of evidence rather than the substantive criminal law.

64. *Supra* n.56.

65. See *Pearce v. Florenca supra* n.7; *Broken Hill South Ltd v. Commissioner of Taxation NSW* (1937) 56 CLR 337 and *M. Moshinsky supra* n.55 at 782.

66. See D.P. O'Connell "The Doctrine of Extra-Territorial Legislative Incompetence" (1959) 75 Law Quarterly Review, 318, at 328 and 329.

Legislation by virtue of the operation of s.2 of the *Colonial Laws Validity Act*. As Gibbs J. observed in *Kermani v. Captain Cook Cruises*⁶⁷

[The answer] is that a matter is not outside the authority of the state simply because if, in the exercise of that authority, the legislature of the State passes a law which is repugnant to an act of the United Kingdom which extends to the State, the result will be that the State law is, by reason of s.2 of the *Colonial Laws Validity Act*, void to the extent of that repugnancy. The provisions of s.2 of the *Colonial Laws Validity Act* do not narrow the ambit of the authority of a colonial legislature, although they may render void certain enactments made in the exercise of that authority.⁶⁸

4. The Coastal Waters (State Powers) Act

(a) The Constitutional Basis

*New South Wales v. Commonwealth*⁶⁹ laid to rest any doubts that the Australian States had sovereignty over or proprietary interest in land below the low water mark. The High Court held that the States do not have, and never have had, such rights.

In purported reliance on the external affairs power under s.51(xxix) of the Constitution,⁷⁰ the Commonwealth passed the *Coastal Waters (State Title) Act* in 1980.⁷¹ At the same time the Parliament using the “request powers” under Section 51(xxxviii) of the Constitution enacted the *Coastal Waters (State Powers) Act* 1980.⁷² The latter Act,⁷³ in furtherance of the Offshore Constitutional Settlement with the Australian States extended the Legislative powers “exercisable from time to time under the constitution of each State” to the making of, inter alia, “all such laws ... as could be made by virtue of those powers if the coastal waters ... were within the limits of the State”.

The Coastal Waters extend from the low water mark to the territorial seas baseline and beyond for three nautical miles.⁷⁴

Additionally, legislative power is extended beyond the coastal waters in the case of subterranean mining,⁷⁵ ports, harbours and shipping facilities⁷⁶ and fishing where arrangements exist with the Commonwealth.⁷⁷

Section 7 states that the Act does not derogate from any existing extra-territorial powers of a State or give effect to a State provision that is inconsistent with a law of the Commonwealth.

Kelly J. and Ambrose A.J. interpreted Section 5 in such a way as to apply existing State laws, independently of any existing extra-territorial provision therein, to the Coastal Waters of the State. Their Honours did not purport to apply the Criminal Code to the Coastal Waters by virtue of the operation of s.14A of the Code in combination with the Coastal Waters Act. This approach would seem to be correct because, whether or not s.5 of the Coastal Waters Act does apply all existing State laws, Section 14A of the Code purports

67. (1985) 159 CLR 351.

68. *Ibid.* at 368.

69. *Supra* n.3.

70. See debate on the Coastal Waters (State Powers) Bill in the House of Representatives, 31st Parliament, in Weekly Hansard No.9 (1980) at 2533.

71. No. 77 of 1980.

72. Act No. 750 of 1980 (Cth).

73. *Ibid.* s.5(a).

74. Sections 3(1) and 4(2).

75. Section 5(b)(i).

76. Section 5(b)(ii).

77. Section 5(c).

to apply well beyond the three nautical miles. To this extent, it cannot be supported by those Coastal Waters Act provisions which extend State Legislative Power beyond the three nautical mile limit. Those "extending" provisions would only catch some very limited matters covered by s.14A.

All of the Australian States, pursuant to the offshore constitutional settlement, requested the Commonwealth Parliament to enact the *Coastal Waters (State Powers) Act*.

In so doing, it is suggested the Commonwealth has only paved the way for the States to enact legislation effective in the coastal waters of the States. Section 51 placitum (xxxviii) of the Constitution refers to the *exercise of power* that can at Federation be exercised only by the United Kingdom Parliament. There are two ways in which this provision can be interpreted. Firstly, it can relate to the position of the Commonwealth Parliament as it stood at 1901 when it would have attracted the fetter of s.2 of the *Colonial Law Validity Act*. On this argument⁷⁸ the placitum refers to an exercise of power (and not to the regulation of the subject matter of the power) the nature and scope of which is to be determined as at the establishment of the Commonwealth and not afterwards. Hence the changes enacted in the Statute of Westminster do not apply to enlarge the ambit of s.51(xxxviii).

At the time of Federation, only the Imperial Parliament had power to make laws with respect to the territorial sea. It had made laws with respect to crime on the high seas by paramount general Admiralty Offences Legislation which applied to all colonies *including* their territorial seas. These were *not* specific Acts with respect to the States.

The Commonwealth can "stand in the shoes"⁷⁹ of the Imperial Parliament, when requested to do so by the States, and exercise the powers that only the Imperial Parliament had over the territorial sea at Federation. But, on this interpretation the Commonwealth could not enact laws repugnant to general Imperial laws because it was fettered at 1901 by s.2 of the *Colonial Laws Validity Act*. It would follow that, in granting the states a full legislative power over the territorial sea, it does so by freeing the states from the doctrine of nexus but subject to s.109 of the constitution *and subject to the restriction that general paramount Imperial laws still apply*. Thus the general paramount Admiralty Offences legislation could not be repealed using the power under the *Coastal Waters (State Powers) Act*.

This narrow view of the interpretation of the placitum has been criticized by at least one commentator.⁸⁰ The contrary argument calls for a literal interpretation of s.51(xxxviii) so that limiting the power of the Commonwealth to that as it stood at 1901 is unnecessary.

This view is summed up by Isaacs J. in *Commonwealth v. Kreglinger and Fernau Ltd*⁸¹

We know, and all the world knows, and we cannot in interpreting modern constitutions of the Empire ignore, the tremendous advances in the status of the Dominions within the Empire even before 1900. That is only another mode of expressing the advance of local responsible government. Constitutions made, not for a single occasion, but for the continued life and progress of the community may and, indeed, must be affected in their general meaning and effect by what Lord Watson ... calls 'the silent operation of constitutional principles ...'.

This interpretation has also been argued for by some commentators.⁸² In *Kirmani's* case,

78. See R.D. Lumb "The Constitution of the Commonwealth of Australia Annotated" 4th edn. Butterworths Aust. 1986 at 197 and R.D. Lumb "Section 51, p.1 (xxxviii) of the Commonwealth Constitution" (1981) ALJ 328 at 330-332.

79. To borrow the expression of Lumb *Ibid.* at 330.

80. G.J. Lindell "Applicability in Australia of Section 3 of the Act of Settlement 1701" (1980) 54 ALJ 628 at 630.

81. (1926) 37 CLR 393 at 413.

82. L. Zines "The High Court and the Constitution" 2nd edn. Butterworths Australia 1986 at 275-278. G. Nettheim "The Power to Abolish Appeals to the Privy Council from Australian Courts" (1965) 30 ALJ 39 at 45-46.

Gibbs C.J.⁸³ expressed the view that the States could request the Commonwealth to exercise the power that could have been exercised in 1901 by the United Kingdom Parliament to repeal Part VIII of the *Merchant Shipping Act* 1894 (Imp.) in so far as it then was part of the law of New South Wales. The *Merchant Shipping Act* is a general statute applying throughout the colonies and was thus a fetter under the provisions of s.2 of the *Colonial Laws Validity Act*.

It is therefore possible that the Commonwealth Parliament, in exercising the power under s.51(xxxiii), was not fettered by s.2 of the *Colonial Laws Validity Act*. On this view it is at least arguable that the enactment of the *Coastal Waters (State Powers) Act* may have extended to the states the powers over the territorial sea also unfettered by s.2 of the *Colonial Laws Validity Act*.

It is implied in the view of Gibbs C.J. in *Kirmani's case* that one State alone may use s.51(xxxviii) to request the repeal of repugnant Imperial legislation applying to it. Doubt about this has been expressed by Professor Lumb.⁸⁴ However, Professor Nettheim was cautiously of the same view as Gibbs C.J.⁸⁵ If the repeal of Imperial Admiralty legislation as it affects the coastal waters of the State of Queensland is a repeal of part of the law of Queensland, *of direct concern only to Queensland*, it is arguable that the request device of s.51(xxxviii) can be utilized by Queensland for that purpose. This is not to lose sight of the changes now brought about by the *Australia Act* 1986. While the *Coastal Waters (State Powers) Act* would seem to have given power to the States over the coastal waters concurrent with that of the Imperial Parliament, it does not follow, it is suggested, that that Act impliedly repeals paramount Imperial Laws presently applying there.

The words "within the Commonwealth" in s.51 placitum (xxxviii) are capable of a literal interpretation giving rise to the exercise of extra-territorial power. This view of the Placitum is accepted by Lumb,⁸⁶ Nettheim⁸⁷ and Zines.⁸⁸

It seems likely that the *Coastal Waters (State Powers) Act* is a valid exercise of the power of the Commonwealth under s.51(xxxviii).

(b) The application to Existing Queensland Laws

Assuming that the *Coastal Waters Act* is valid the question arises as to what is its intended ambit and effect.

It is described as an "Act to extend the legislative powers of the State in and in relation to Coastal Waters". This suggests a *conferring* of power. The key provision is s.5 extracted at p.162 above.

The word "exercisable" in its ordinary use means capable of being exercised. It perhaps would have been a simple matter to add "exercised and ..." before the word "exercisable" if an application of the existing laws to the coastal waters was clearly intended by the Legislature.

It is suggested that the Act, by using the words "exercisable from time to time" in describing the legislative powers that are extended to the coastal waters of the States, constitutes a conferring of increased powers on the States as opposed to the exercising of any such extended power by applying all State laws in the coastal waters.

83. *Supra* n.67 at 372.

84. Lumb 4th edn. *supra* n.78 at 197; Lumb *Supra* n.78 at 332.

85. Nettheim *Supra* n.82 at 48.

86. Lumb *Supra* n.78 at 389.

87. Nettheim *Supra* n.82 at 46.

88. Zines *Supra* n.82 at 278.

Whatever guidance there may be in the explanatory memorandum and Second Reading Speeches would not appear to be available to any court interpreting the legislation because s.2(2) of the Act applies the *Acts Interpretation Act* 1901 (Cth) as it was in force immediately before the day on which the Act received Royal Assent. At that time s.14AB of the *Acts Interpretation Act* (Cth) was not in force.

Zines appears to be of the view that the *Coastal Waters Act* provides for a power *to be exercised by* the States and that it is then for the States *to exercise* that power in accordance with or in pursuance of the authority granted by the Commonwealth Act.⁸⁹

Lumb makes the following statements about the Act: “a source of power in the States to legislate with respect to coastal waters”⁹⁰ and “the Commonwealth Parliament standing in the shoes of the Imperial Parliament is signalling to the States a full legislative power over these areas.”⁹¹

Other Australian States have enacted legislation applying all of their State laws in the Coastal Sea⁹² and in so doing appear to recognize that the Commonwealth Act merely provides the power for the States to legislate.

Section 6 of the *Coastal Waters (State Powers) Act* provides that the Act does not derogate from any existing power in the States to legislate extra-territorially. This section suggests also that in extending the general State legislative powers, no attempt has been made to apply them or curtail them.

The power of a State to legislate extra-territorially depended on the statutory doctrine which required that a nexus or connection be established with the peace order and good government of the State. That requirement endured up until the enactment of the *Australia Act* in 1986. However, any exercise of State legislative power pursuant to the *Coastal Waters (State Powers) Act* will not require “nexus with the State” as that requirement is understood with respect to peace order and good government of the State where the legislation is of extra-territorial application. This will be so whether the activities involve Australian residents or foreigners within the coastal waters because the grant of extended legislative power is to be exercised as if the coastal waters were “*within the limits of the States*”.⁹³ Of course, the legislation must in any event be for the peace, order and good government of the State and to the extent that that is a limitation on the exercise of power by the State, it will apply.⁹⁴

It is arguably the case that until Queensland legislates to apply the Criminal Code (and any other State legislation) to the coastal sea that law does not apply there. On the other hand, if the interpretation of the Act by Justices Kelly and Ambrose in *R v. Fritz* is correct, then the Act is simply of ambulatory effect and of its own force applies all existing legislation in the coastal waters. In either case there is no requirement of “nexus” with the State.

It has been seen that the fetter of the *Colonial Laws Validity Act* may not apply to the Commonwealth when exercising the powers under s.51(xxxviii). The *Coastal Waters Act*, however, extends the general legislative powers of the States to enact laws “as could be made if the coastal waters were within the limits of the state.” The wording “*as could be made*” seems to suggest that if any Act for any existing reason could not be enacted within the

89. *Ibid.* at 279.

90. R.D. Lumb *Australian Coastal Jurisdiction*, in *International Law in Australia* 2nd edn. 1984, Ch. 5 at 373. See also similar descriptions at 375, 376 and 382.

91. Lumb *Supra* n.78 at 330.

92. See for example, *Application of Laws (Coastal Sea) Act* No. 146 of 1980 (NSW), *Coastal and Other Waters (Application of State Laws) Act* No. 12 of 1982 (Tas).

93. See the wording in the NSW Act No. 146 of 1980 s.4.

94. See *Building Construction Employees and B.L.F. of NSW v. Minister for Industrial Relations* (1986) 7 NSWLR 372 at 382 and 383.

State then equally it cannot be made to apply to the coastal waters. Now if an Act could not be made within the State because of the fetter of the *Colonial Laws Validity Act* s.2, then that fetter may not be removed by the *Coastal Waters (State Power) Act* on its proper construction. Therefore, if the paramount Admiralty laws could be viewed as applying English law to those parts *within the State* that are the coastal waters then an attempt to pass laws repugnant to them may fail.

A matter may still be within the authority of a State even though it is subject to some limitation upon its enactment. In *Kirmani's Case*, Gibbs⁹⁵ and Dean JJ.⁹⁶ rejected the argument that a law void by operation of s.2 of the Colonial Laws Validity Act was not within the authority of the States within the meaning of s.9(1) of the Statute of Westminster 1931 (Imp.). Brennan J.⁹⁷ was of the contrary view. Wilson J. was of the view that the special requirements in ss 735 and 736 of the paramount *Merchant Shipping Act* (allowing States to regulate coastal trade) did not take that power outside the authority of the States. However, he recognized that those provisions were to accord a measure of freedom from the repugnancy fetter of s.2 of the *Colonial Laws Validity Act*.⁹⁸

It can be argued, perhaps, that the extension of a limited legislative power by the Imperial Parliament (being a freeing of the States from what is otherwise a fetter of repugnancy under s.2 of the *Colonial Laws Validity Act*) is analogous to what has been done by the Commonwealth Parliament, standing in the shoes of the Imperial Parliament, in enacting the 1980 *State Powers Act*. Thus, because the Commonwealth is not fettered by s.2, the extension by it (albeit at the request and with the consent of the States) of general legislative power also frees the States from the fetter of the *Colonial Laws Validity Act*.

If this were so, the *subsequent* extension by Queensland legislation of the criminal laws into the coastal sea would be valid notwithstanding the repugnancy to the Imperial Admiralty Acts.

5. The Crimes at Sea Act

(a) The Constitutional Basis

The *Crimes at Sea Act* (1979) (Cth)⁹⁹ was enacted as part of the Offshore Constitutional settlement between the Commonwealth and the States¹⁰⁰ consequent upon the declaration of Commonwealth sovereign rights and ownership below the low water mark in *NSW v. Commonwealth*.¹⁰¹

It was expected that the States would enact complementary legislation applying State criminal laws in the coastal waters of the State.¹⁰²

Queensland was the only State to fail to enact complementary legislation¹⁰³ perhaps relying on what it perceived to be the broader jurisdiction under s.14A of the Code.

The validity of the Crimes at Sea legislation would in all probability be upheld by the

95. *Supra* n.67 at 368.

96. *Ibid* at 432 and 433.

97. *Ibid* at 414.

98. *Ibid* at 393, 394.

99. No. 17 of 1979 (Cth).

100. See Second Reading Speech by the Minister for Employment and Youth Affairs in the House of Representatives, 31st Parliament, Weekly Hansard No.2 (1979) at 399; Second Reading Speech by Commonwealth Attorney General, Senate Hansard, 22nd August, 1978, at 201.

101. *Supra* n.23.

102. Second Reading Speeches *supra* n.100 at 400 and 204.

103. See for example, *Crimes (Offences at Sea) Act* 1978 (Vic) No. 9229 of 1978; *Crimes (Offences at Sea) Act* 1980 (NSW) No. 145 of 1980.

High Court founded upon the external affairs power. This power has been broadly interpreted by the majority of the High Court in *NSW v. Commonwealth* (The Seas and Submerged Lands Case) and in *Commonwealth v. Tasmania*¹⁰⁴ (the Franklin Dam Case).

The External Affairs power has been recognized by members of the High Court to extend to matters independently of any treaty implementation. In the *Seas and Submerged Lands Case*, the Justices recognized Commonwealth legislative power would extend to matters and things as well as relationships which are external to Australia.

Jacobs J. recognized the power to make laws "in respect of any person or place outside and any matter or thing done or to be done or prohibited to be done outside the boundaries of the Commonwealth".¹⁰⁵

In *Kirmani's* case three members of the High Court¹⁰⁶ were of the view that the mere fact of the Commonwealth enacting legislation that had the effect of repealing Imperial legislation applying to Australia was an "external affair" because it affected Australian relations with that country. Three other judges, however, took the view that Imperial law operating in a State was part of the internal law of Australia and its repeal did not involve relations with the United Kingdom. It is arguable¹⁰⁷ that the *Crimes at Sea Act* (Cth) repeals by necessary implication the *Imperial Admiralty Offences Acts* as they apply to interstate and international voyages involving British ships and British subjects and, indeed, foreigners. On the former view it is an external affair and the Act is valid under s.51(xxxviii).

Apart from this the *Crimes at Sea Act*, purports to apply in the sea surrounding the Australian continent. This involves the territory of Australia and must involve a law with respect to external affairs. As Gibbs J. observed in the *Franklin Dam Case*:¹⁰⁸

If a matter can properly be said to relate to other matters or things external to Australia, the parliament may pass laws with respect to it, even though it is not regulated by international agreement.

The Act involves also certain things done by foreigners and foreign ships on the seas. The following comment by Zines is apposite:

... even if the view is accepted that the external affairs power is concerned with relations between countries (which seems unlikely), it is difficult to see why an attempt by Australia to exert governmental power in other lands *or on the High Seas* is not such a power. An act of that nature is of direct concern to other powers.¹⁰⁹

The Act may also receive some support from the "trade and commerce" power under Sections 51(i) and 98 of the Constitution.¹¹⁰

The *Crimes at Sea Act*, rather than extending State powers simply purports to *apply* State Criminal Laws at sea by adopting them as part of a Commonwealth Act. The scheme of the Act is to apply the laws of the State to offences on and from Australian ships on overseas and interstate voyages.¹¹¹

There is nothing in the Act which allows State laws to operate beyond the territorial limits of the States. The Act is not unlike the *Commonwealth Places (Application of Laws) Act* 1970 (Cth). That Act was passed by the Federal Government relying on its exclusive power

104. (1983) 158 CLR 1.

105. *Supra* n.23 at 497.

106. *Supra* n.67. See Mason J. at 381; Dean J. at 434; Murphy J. at 385.

107. A.C. Castles "Limits on the Autonomy of the Australian States" 1962 Public Law 175 at 183.

108. *Supra* n.104 at 98.

109. *Supra* n.82 at 263.

110. R.D. Lumb *supra* n. 78 at para 662; P.H. Lane 'A manual of Australian Constitutional Law' 3rd edn. Law Book Co. Ltd Sydney 1984 at 40.

111. *Supra* n.100 at 400.

under s.52(i) of the Constitution to make laws with respect to places acquired by the Commonwealth. It had been held by the High Court in *Worthing v. Rowell and Maston Pty Ltd*¹¹² that there was no power in the States to enact laws that would operate in Commonwealth places. The *Commonwealth Places Act* applies the State laws as Federal legislation. The State laws are adopted by the Commonwealth Parliament as the Commonwealth law to apply in and to all Commonwealth places.¹¹³

The *Crimes at Sea Act* similarly appears to apply State criminal laws as Federal law to offences committed within the area of the sea covered by the Commonwealth's constitutional power. However, specific Federal criminal laws such as those relating to Customs offences and where applicable, the *Crimes Act 1914*, continue to apply. Any inconsistency between those specific Federal criminal provisions and the Queensland Criminal Code would, of course, be resolved by the application of s.109 of the Constitution.

There are similar provisions in both the *Commonwealth Places (Application of Laws) Act* and the *Crimes at Sea Act*. For Example, in s.41 of the *Application of Laws Act*, there appear the words "the provisions of the laws of a State as in force ... apply ...". Similar wording is found in ss 6 to 10 inclusive of the *Crimes at Sea Act*. These words appear to recognize that Commonwealth Legislation cannot apply State laws as such, but only apply the provisions of State law as Commonwealth law.¹¹⁴

Section 41 of the *Crimes at Sea Act* allows the Governor General to make arrangements with the State Governors for "the exercise or performance in or in relation to that State ... of a power, duty or function (other than the exercise of judicial power) by an authority of the State under the applied State criminal laws". Where such arrangements are in force, s.5(4) renders inapplicable various sections of the *Crimes Act 1914*, the *Judiciary Act 1903*, and the whole of the *Commonwealth Provisions Act 1967*. These are generally provisions in relation to arrest, seizure, search and the institution and conduct of proceedings. Roughly similar provisions are found in ss 6(2) and 5(3) (read with a Schedule) respectively of the *Commonwealth Places Act*. Thus, if no arrangements are made under the *Crimes at Sea Act* the State authorities have no duties imposed upon them. In those circumstances, the Commonwealth procedures apply, however, s.68 of the *Judiciary Act* remains in operation. These provisions outlined reinforce the interpretation of the *Crimes at Sea Act* as merely applying the State criminal laws as Federal laws.

(b) The Crimes at Sea Act and Section 14A of the Code

The *Crimes at Sea Act* in s.3(a) defines Australian Ships as (a) ships registered in Australia under an Act applicable throughout Australia or (b) any other ship not registered in a foreign country the operations of which are based in a place in Australia or which is owned by residents of Australia or companies incorporated in Australia. This would seem to catch a "British ship" applying the criteria of *Oteri v. R.*¹¹⁵

"Ship" is defined to include a vessel or boat of any description and any floating structure and any hovercraft.

The place at which a ship's voyage commences constitutes a place of call of the ship.

By s.6(1), the State criminal laws apply to any act committed on or from an Australian ship which is (i) connected with the State and (ii) was in course of a prescribed voyage.

112. (1970) 123 CLR 89.

113. P.J. Hanks "Australian Constitutional Law" 3rd edn. Butterworths Australia 1985 at 5 and 152; P.H. Lane *supra* n.110 at 462; C. Howard "Australian Federal Constitutional Law" 2nd edn. Law Book Co. Ltd Sydney 1972 at 487.

114. See D.J. Rose "The Commonwealth Places (Application of Laws) Act 1970" (1971), 4 F.L. Rev 263 at 268.

115. *Supra* n.42.

It appears, therefore, that it applies to *any person* whether resident or domiciled in a State or not (and whether an Australian Citizen or a “British Subject” or not). To this extent, the “people” whose acts are caught include those people in s.14A(2) of the Queensland Code (i.e. resident or domiciled “in Queensland and” on or operating from a vessel” etc.).

(i) A ship is *connected with a State* if it is (a) registered at a place in a State under an Act applicable throughout Australia *or* (b) registered or licensed for a particular purpose under any Commonwealth or State law *or* (c) has its base of operations in the State *or* (d) is “reasonably regarded as having a connection with the State having regard to all relevant considerations”.

The most relevant Act under (a) would now seem to be the *Shipping Registration Act 1981* (Cth) which requires all Australian owned ships to be registered under that Act.

The connection under (b) and (c) would catch the sorts of vessels and structures described in s.14A(2)(b) of the Queensland Criminal Code.

(ii) A *prescribed voyage* is one where the last preceding place of call (which includes the place at which a ship’s voyage commences or a place in the territorial sea of a State) was a place in the State and when it departed the next intended place of call was a place outside that State.

The intention here is to catch both interstate and overseas voyages.

There does not, therefore, appear to be any suggestion in Section 6 that the acts caught must be *outside* the territorial sea. Thus, the criminal laws of a State apply as Federal Law to any person on an Australian ship connected with the State from the low water mark and beyond when on an interstate or overseas voyage. Hence, there is *no* 200 mile limit to the jurisdiction as in s.14A of the Code. Section 14A, in addition to encompassing those people caught by s.6 of the Crimes at Sea Act, encompasses persons connected with Queensland who are on *intrastate* voyages if those voyages take them onto the “high seas” within 200 miles of Queensland. If “high seas” in s.14A means the same thing as it does in the Admiralty jurisdiction then it includes the territorial sea.¹¹⁶ If on the other hand it has the meaning ascribed to it by Ambrose A.J. in *R v. Fritz* (No. 1) then it is only intrastate voyages outside the territorial sea that are included.

Section 6 also applies to any act on or from an Australian Ship in a place in a foreign country if the ship is connected (in the ways previously outlined) with a State. Hence this applies to any act by any person on an Australian ship connected with Queensland while in any country other than Australia and as such again extends the jurisdiction far beyond the 200 mile “high seas” jurisdiction under s.14A of the Code.

Section 8 applies State criminal laws to acts by Australian citizens who are on foreign ships but who are not members of the crew. The State laws are those of the State where the person was domiciled or had his last place of residence and the acts punishable must have been committed beyond the limits of the territorial sea. Section 14A of the Code would apply to those people but only to the limits of 200 miles and possibly additionally in the territorial sea depending on the true meaning of “high seas” in that provision.

Section 7 applies to any act by any person (including therefore Queensland citizens) committed on or from a foreign ship when it is beyond the territorial sea in the course of a voyage to a place in Australia (which includes a place in the territorial sea of a State: Section 3(3)). It also applies to a ship engaged in fishing or in respect of which a licence is in force under the Fisheries Act 1952 “at a time when the ship is in the Australian fishing zone beyond the outer limits of the territorial sea”. If that person later enters or is brought into the State then the State criminal laws apply.

116. See the cases collected at p.163.

This provision is somewhat similar to s.14A(3) of the Queensland Criminal Code. The Code provision applies Queensland criminal laws to any person who while on the high seas within 200 miles of Queensland does an act affecting the person or property of a person connected with Queensland and then *afterwards comes into Queensland*. Again the Queensland provision may apply in the territorial sea and again the Commonwealth Act does not have any 200 mile limitation or in this case, the need for the act to have affected a person connected with a State.

Importantly, however, where the person under the *Crimes at Sea* provision is a foreigner then he has a defence available that is not available to him under the Queensland provision and except in the case of piracy, an offence cannot be prosecuted without the consent of the Attorney-General. Under subsection 4, it is a defence for a person who is not an Australian Citizen to establish that the act constituting the offence would not have constituted an offence against the law of the country of which the person is a national.

Under subsection 5, proceedings cannot commence (except for fishing offences) without the consent in writing of the Attorney-General.

Subsection 6 lays down that if a country other than Australian has jurisdiction under international law in relation to a foreign ship then the Attorney-General shall not consent unless the Government of that country has also consented.

(c) Inconsistency

The test to be applied to determine whether there is inconsistency between Commonwealth and State laws under s.109 of the Constitution was laid down by Dixon J. (as he then was) in *Ex parte McLean*.¹¹⁷ At page 483 His Honour said this:

When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and s.109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v. Palmer*).

This was approved by the Full High Court in *Viskauskas v. Niland*.¹¹⁸ The court said this:

Again in *Victoria v. Commonwealth* (1937) 58 CLR 618 at 630, Dixon J. said “if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent”.

...

At least with regard to the subject matter of racial discrimination in relation to the provision of goods and services, the test as stated in *Ex parte McLean*, supra, applies exactly — the two legislatures have legislated upon the same subject, and have prescribed what the rules of conduct will be and (if it matters) the sanctions imposed are diverse. Clearly in respect of that subject matter there is an inconsistency.

It can readily be seen that there is substantial overlapping of the provisions of the *Crimes at Sea Act* and s.14A of the Queensland Code already discussed. There are also substantial conflicts, particularly in the case of Section 7, and in all cases there is a considerable extension of the geographical jurisdiction beyond the 200 miles claimed by the Queensland provision. Section 109 of the Constitution would operate at least to the extent of the inconsistencies

117. (1930) 43 CLR 473.

118. (1983) 153 CLR 280 at 291, 292 and 293.

to render s.14A void. It may be that, because of its terms and subject matter, the *Crimes at Sea Act* purports to cover the whole field of criminal law applicable to maritime crime beyond the limits of the territorial sea and on interstate and overseas voyages. This proposition could be said to receive some additional support from the subject matter of Sections 9 to 11 and from the recurrent use of the expression "and not otherwise".

Section 9(1) applies the Criminal laws of a State in the adjacent area of a State beyond the territorial sea "to all acts committed by or in relation to, and all matters, circumstances and things affecting, any person who is in the adjacent area for a reason touching, concerning, arising out of or connected with the exploration of or the exploitation of the resources of, the continental shelf" Section 9(2) states that "the provision (of the Criminal Law) referred to in subsection (1) apply by virtue of subsection (1) to an in relation to (all acts concerning) the continental shelf ... *and not otherwise*". The words "and not otherwise" may be understood as a denial of the operation of State laws in regard to acts in relation to the continental shelf area otherwise than by virtue of Commonwealth law. The words also occur in s.10 which refers to matters declared by regulations as the subject of Australian jurisdiction under international law. The provisions of the State criminal laws apply by virtue of s.10(1) to and in relation to all acts in connection with the matters declared by regulation *and not otherwise*.

Section 11(1) applies the provisions of the State criminal laws in any prescribed area of waters beyond the territorial sea. The provisions referred to in subsection 1 of Section 11 apply by virtue of that subsection to and in relation to all acts that are committed by Australian citizens or Australian residents (other than acts to which s.9 and s.10 apply) *and not otherwise*.

The way that State criminal laws could perhaps apply *otherwise* than by application as Commonwealth laws is where they apply by virtue of a sufficient nexus with the peace welfare and good government of the State or by virtue of the Admiralty jurisdiction.

Section 15 of the *Crimes at Sea Act* is as follows:-

This Act is not intended to exclude the operation of any provision of a law in force in a State or Territory in so far as that provision is capable of operating concurrently with the provisions of the criminal laws in force in the States ... as applying by virtue of this Act.

There are significant conflicts between the *Crimes at Sea Act* and Section 14A of the Code and it is doubtful to what extent the latter is capable of "operating concurrently" with the former. It seems that in the case of matters covered by Sections 9, 10 and 11 the concurrent operation of State provisions is specifically excluded by the use of the words "and not otherwise".

In respect of the application of Sections 6, 7 and 8 the same laws and penalties are applied (i.e. the Queensland State criminal laws) but the person to whom they are applied and the geographical locations in which they are applied are different from those to whom and to which s.14A applies. Under s.7 the defences that are available are more extensive than under the Queensland Act and a condition precedent to proceedings is included that does not exist under the Queensland Act. The concurrent operation of s.14A of the Criminal Code would not seem, therefore, to be saved by the presence of s.15 of the *Crimes at Sea Act*. At best s.14A would apply to matters in the territorial sea that were not interstate and overseas voyages and to intrastate voyages (including those outside the territorial sea) not caught by the *Crimes at Sea Act*.

It may be that on a proper reading of the Commonwealth Act it would be held to cover the field and thus s.14A would be invalid under s.109 of the Constitution.

(d) Commonwealth Repeal of Imperial Legislation

In so far as the Admiralty Jurisdiction is concerned the *Crimes at Sea Act* would seem to have substantially repealed by implication much of the ambit of the Imperial Admiralty Offences Acts that apply to the States. If that is the effect of the Commonwealth Act then the states would have lifted from them the operation of s.2 of the Colonial Laws Validity Act.

As Brennan J. observed in *Kirmani's* case:

The other exception flows from the effect upon State authority of repealing or amending an Imperial law extending to a State. If the Commonwealth Parliament should repeal an Imperial law extending to a State, the legislative authority of the State is no longer restricted by the existence of the Imperial Law. In the absence of some special exclusion, the matter on which the repealed law was made falls within the authority of the States once the repeal takes effect. Effect must be given to the repeal before the matter on which the repealed law was made falls within State authority but, upon the repeal of the Imperial law, a Commonwealth law purporting to control or affect the matter on which the repealed law was made must find support in a constitutional head of Commonwealth power.

From the time when the amending provision takes effect, the law expresses the legislative intention of the Commonwealth Parliament, not the legislative intention of the Imperial Parliament. Section 2 of the *Colonial Laws Validity Act* was enacted to protect from colonial legislative interference the provisions of any Act of Parliament extending to the Colony, that is, the expression of the legislative intention of the Imperial Parliament. When a law expresses the legislative intention of the Commonwealth Parliament, the *Colonial Laws Validity Act* has no relevant operation with respect to it. The matter which is governed by the amended provision is no longer a matter upon which a State is precluded from enacting a repugnant law. If a State were to enact a State law repugnant to the amended provision, the amending Commonwealth law could not be made to prevail over the State law in virtue of the *Colonial Laws Validity Act*. Only s.109 of the Constitution could operate to make the Commonwealth law prevail.¹¹⁹

In *Kirmani's* case Wilson J. was of the view that s.65 of the *Navigation Amendment Act* (1979) (Cth) impliedly repealed parts of the *Imperial Merchant Shipping Act* relating to limitations of liability. His Honour held that the Commonwealth Parliament had no power to repeal that Act with respect to intrastate shipping which was not sea-going. However, with respect to intrastate shipping which was sea-going he held the repeal to be a valid exercise of Commonwealth power. In that event, his Honour appears to be of the view that the repeal by the Commonwealth of the Imperial Act removed the fetter from State Legislatures to make laws. He said this at p.396:

Indeed as to sea-going intrastate shipping, the provisions of Section 332(3) of the principal Act encourage them to enact at least some local laws. In this respect, the Parliament may have performed a service for the States by the convenient removal of an anachronistic piece of Imperial Legislation which affected their legislative powers ...

If the *Crimes at Sea Act* is an implied repeal or amendment of the Imperial Admiralty Laws to the extent that they apply perhaps beyond the State coastal waters, it is possible that that alone would remove the fetter of s.2 of the *Colonial Laws Validity Act* upon those parts of s.14A of the Code that are not inconsistent with the *Crimes at Sea Act* itself without the need for further legislation by the State. Brennan J. seemed to recognize this possibility

119. *Supra* n.67 at 415 and 416.

in *Kirmanis*'s case at p.414 but expressed no concluded opinion upon it. His Honour said:

The question whether it is possible for a colonial legislature to enact a law repugnant to an Imperial law extending to the colony is answered by *Marais*' case. It denies that the Parliament of a State could enact such a law. *It may be that what the colonial legislature attempts to enact is kept, so to speak, in suspension until any Imperial law extending to the colony to which it is repealed.* But the product of such a legislative attempt is not a law. The Colonial Laws Validity Act gives supremacy to Imperial laws extending to a State not by making one law prevail over another but by denying authority to the State to make a repugnant law. (emphasis added)

Nevertheless the operation of the Admiralty Acts in the territorial sea and in respect of intrastate voyages beyond it may still survive to conflict with State provisions. If the Admiralty Acts are repugnant to s.14A of the Queensland Criminal Code then the latter continues to be void and inoperative even after the passing of the *Australia Acts*.

Additionally, s.14A would seem to fall within the tests approved in *Viskauska*'s case as it legislates on the same subject matter and has prescribed what the rules of conduct will be in the case of many crimes covered by the *Crimes at Sea Act*. Section 109 of the Constitution would render s.14A invalid to the extent of that inconsistency. However, in the case of an offence committed on an intrastate voyage whilst beyond the limits of the territorial sea, it would be an undesirable result if no criminal law applied. It may be that s.15 of the Commonwealth Act would have the effect of saving the operation of s.14A of the Queensland Code in such a case. For the same reason it would be a desirable construction of s.15 to save the operation of s.14A of the Code in so far as it applies to offences committed on intrastate voyages in the coastal waters of the State. However, the problem of repugnancy to the Imperial Admiralty Statutes still operating in those areas remains and it may be that the appropriate law to be applied in these cases is the law of England. In that event the curious result may be that in the case of the allegation for example of the rape over Maraki Reef, the accused would have had the defence of honest but mistaken belief in consent available to him whereas under the Queensland laws the belief in consent would have had to also be reasonably held pursuant to s.24 of the Criminal Code.

6. Summary

The *Admiralty Offences Acts* apply English criminal laws to offences on the high seas by British subjects or persons on British ships. Queensland and Australian residents continue to be British subjects and their ships continue to be British ships. The *Admiralty Acts* also apply to foreigners within three nautical miles of the coast. It is tolerably clear from the case law that the high seas include the coastal waters of Queensland and even parts of the rivers within Queensland.

These Imperial Acts are general acts of paramount force and s.2 of the *Colonial Laws Validity Act* renders State laws repugnant to them void and inoperative absolutely. Section 14A of the Queensland Criminal Code purports to apply Queensland criminal laws to offences on the high seas within 200 miles of the coast and, notwithstanding that a nexus with peace, order and good government of Queensland can arguably be established, s.14A, in applying those laws, may be repugnant to the Admiralty laws.

The *Commonwealth Coastal Waters (State Powers) Act* grants legislative power to Queensland to pass laws with respect to the coastal waters of the State. This Act arguably does not apply existing State laws in the coastal sea and on its proper construction may not remove the fetter of s.2 of the *Colonial Laws Validity Act* notwithstanding that the Commonwealth itself, when exercising the power under s.51(xxxviii), may not have been fettered by that Act.

Queensland did not enact Crimes at Sea legislation for the coastal waters of the State pursuant to the Offshore Constitutional Settlement with the Commonwealth.

Arguably, therefore, notwithstanding that the *Coastal Waters (State Powers) Act* removed the requirement of nexus with the State, s.14A of the Code is still repugnant to the Admiralty Offences law applying in the coastal waters of Queensland.

The *Commonwealth Crimes at Sea Act*, being a valid enactment pursuant to the external affairs power in the Constitution, may have repealed or amended the Admiralty Offences legislation to the extent that these Acts apply beyond the coastal waters of the State. It seems reasonably clear that s.14A of the Queensland Code is inconsistent to a significant degree with the *Commonwealth Crimes at Sea Act*. The Commonwealth Act may cover the field of crime at sea beyond the coastal waters of the State. However, if s.14A of the Code does validly apply Queensland criminal laws to some offences beyond the coastal waters, the *Crimes at Sea Act* may have removed the fetter of s.2 of the *Colonial Laws Validity Act* without the need for further legislation.

Arguably, therefore, the application of Queensland criminal laws within the coastal waters is still repugnant to the Imperial Admiralty Offences legislation and this will continue to be so, even after the passage of the Imperial *Australia Act*, until Queensland enacts legislation with respect to crime in that area.

It is suggested that the difficulties indentified in this article could be removed by the Queensland Parliament enacting legislation pursuant to its powers under the *Coastal Waters (State Power) Act* being now freed by the *Australia Act* from the anachronistic fetters of Imperial Legislation.